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NOTE VERBALE DATED 12 MARCH 1993 FROM THE PERMANENT MISSION OF MEXICO TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

The Permanent Mission of Mexico to the United Nations presents its compliments to the Secretary-General and has the honour to transmit to him herewith the text of the views of the Government of Mexico, supplied pursuant to paragraph 2 of Security Council resolution 808 (1993) on the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

The Permanent Mission of Mexico to the United Nations would be grateful if the Secretary-General would have this letter and its annex distributed as a document of the Security Council.

Annex

Views of the Government of Mexico supplied pursuant to paragraph 2 of Security Council resolution 808 (1993)

Introduction

1. The Government of Mexico wishes to place on record its satisfaction at the determination shown by the Security Council to promote respect for international humanitarian law in the States of the former Socialist Federal Republic of Yugoslavia. Accordingly, Mexico reaffirms its support for Security Council resolutions, including resolution 808 (1993), demanding an immediate end to all violations of international humanitarian law, particularly those occurring in the territory of Bosnia and Herzegovina.

2. However, Mexico wishes to express its concern at some aspects of the procedure that was followed in deciding to establish an international tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The Mexican Government also wishes to give its views on the jurisdiction and rules of procedure of the tribunal that is ultimately established.

Establishment of an international criminal court

3. It is clear that Security Council resolution 808 (1993) raises issues on which there is as yet no widely-shared opinion within the international community. First of all, the establishment of an international criminal court is closely linked to the exercise of State sovereignty, both from the standpoint of territorial jurisdiction and from that of personal jurisdiction. This explains why the General Assembly, acting through the International Law Commission, has yet to complete the mandate entrusted to it with regard to the draft Code of Crimes against the Peace and Security of Mankind, to which the question of the establishment of an international criminal court is related. This delay can be attributed to lack of political will on the part of Member States. However, it cannot be denied that lacunae in the progressive development of international law, such as the absence of a definition of aggression for almost two decades, prevented progress from being made in the consideration of this topic.

4. The decision taken by the Security Council has no precedent in the annals of the United Nations. Although we have the historic precedent of the 1945 London Agreement establishing the Nürnberg Tribunal and the subsequent formulation of the principles contained in General Assembly resolution 95 (I) which establish individual responsibility for violations of humanitarian law, this is the first time that the establishment of an international criminal court has not been brought about by the action of a group of victorious Powers. There is no express provision in the Charter of the United Nations which can be invoked as giving the Security Council or the General Assembly the power to establish a special criminal court with binding jurisdiction.

5. Now, in the present case, it must be recognized that the situation in the former Yugoslavia is a threat to the maintenance of international peace and

security, so that intervention by the Security Council under Chapter VII of the Charter is fully justified. Accordingly, the establishment of an international criminal court such as that referred to in resolution 808 (1993) must be understood as a measure designed to put an end to the conflict taking place in the former Yugoslavia.

6. Given the extraordinary circumstances which prompted the decision to establish the tribunal, this tribunal is special and does not therefore create any precedent for the future establishment of a universal, permanent international criminal court with binding jurisdiction. Any such future tribunal will have to have optional jurisdiction and will have to be established as a result of a convention or international treaty freely signed by States, on the basis of the corresponding recommendations made by the International Law Commission to the General Assembly.

7. In this context, it is extremely important to emphasize that the General Assembly is, by virtue of Articles 10, 11, 13, 14, 34 and 35 of the Charter of the United Nations, vested with responsibilities in the maintenance of international peace and security. By virtue of those Articles, and notwithstanding the provisions of Article 12 of the Charter, the General Assembly has the power to make recommendations for the maintenance of international peace and security and, in the absence of action by the Council, could even take whatever measures it deems appropriate.

8. In this particular case, the General Assembly could have played an important and valuable role in supporting and advising the Security Council, especially since this is a matter related to the issue of the establishment of a universal international criminal court, an issue on which significant progress has been made in the International Law Commission since 1990.

9. The Government of Mexico has always believed it vitally important to ensure a proper balance between the principal organs of the United Nations. To this end, Mexico has advocated the need to adapt the Organization's working methods and, in particular, to strengthen the role of the General Assembly.

10. At the same time, the Government of Mexico believes it is essential, in order to guarantee that Member States adhere fully to the decisions of the Security Council, that the Council's actions should at all times respect the sovereign rights of States and that its decisions should be taken in a context of transparency which reflects the interests and aspirations of all States Members of the United Nations.

11. Mexico reiterates that the dialogue between the Security Council and the General Assembly must be reinforced, so that the Assembly can make full use of its powers and can take a position on situations which could threaten international peace and security, without prejudice to the primary responsibility vested in the Security Council.

12. With this idea in mind, the Government of Mexico believes that the basis for the Security Council's decision could be found, as was done in the report of the committee of jurists submitted by France (S/25266), in the powers conferred on it by Article 41 of the Charter, since the list of measures in that Article is not exhaustive. However, it must be made clear that as early

as the San Francisco Conference, Mexico and other countries proposed that decisions taken by the Council under Article 41 should have the prior approval of the General Assembly (see UNCIO, IV, p. 223). This shows that Mexico has always been concerned to secure the establishment of a system of collective security which takes the rights and legitimate aspirations of the entire international community into account.

Principles governing the functioning of the international tribunal

13. The Government of Mexico believes that, in order for the tribunal established by resolution 808 (1993) to have the necessary legitimacy, its main attribute must be its total independence from any State or international, governmental or non-governmental political organ, and the impartiality of its proceedings and members.

14. In this connection, Mexico believes that neither the Security Council nor any other organ should interfere in the performance of the functions entrusted to the tribunal once the tribunal has been established and has been provided with a statute.

15. The judicial proceedings carried out by the tribunal will have to adhere strictly to the general principles of law, such as the need to guarantee the right of due process and the protection of the individual rights of the accused.

16. Furthermore, the members of the tribunal will have to be individuals of recognized legal competence, impartiality and integrity, in order to guarantee the objectivity of trials. Judges will have to be unremovable to safeguard their independence.

17. Mexico believes that the tribunal, like any other court, should decide for itself whether it is competent to hear a given case that is submitted to it. However, its statute will have to delimit very clearly and precisely its material sphere of competence, which will have to be restricted to crimes typified by international law, and its territorial sphere, which will have to be limited to the territory of the former Yugoslavia.